No. 15832

# United States Court of Appeals
## For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION NO. 117, AFL-CIO, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR THE RESPONDENT UNION

BASSETT, DAVIES & ROBERTS
811 New World Life Building
Seattle 4, Washington
*Attorneys for Respondent Union.*

*Of Counsel:*
RICHARD P. DONALDSON

THE ARGUS PRESS, SEATTLE

No. 15832

# United States Court of Appeals
## For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION NO. 117, AFL-CIO, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR THE RESPONDENT UNION

BASSETT, DAVIES & ROBERTS
811 New World Life Building
Seattle 4, Washington
*Attorneys for Respondent Union.*

*Of Counsel:*
RICHARD P. DONALDSON

THE ARGUS PRESS, SEATTLE

## INDEX

Page



## TABLE OF CASES

**TEXTBOOKS**



**STATUTES**

# United States Court of Appeals
## For the Ninth Circuit

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION NO. 117, AFL-CIO, *Respondents.* | No. 15832 |

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR THE RESPONDENT UNION

### COUNTER-STATEMENT OF THE CASE

The statement of the case contained in petitioner's brief (pp. 2-12) does not purport to contain a full exposition of the relevant and material facts of this case. Petitioner has chosen merely to present those "subsidiary facts upon which the (Board's) findings rest" (See petitioner's brief, p. 3).

Respondent union believes that for this court to properly exercise its appellate function of reviewing the "whole record" in this case, it is essential that a more complete statement of the facts be made.[1] Ac-

[1] Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Section 141 *et seq.*, provides that the Board's findings of fact are conclusive only where "supported by substantial evidence on the record considered as a whole." See *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 95 L.ed. 456 (1951).

cordingly, we present this counter-statement of the case.

Respondent union has been found by the National Labor Relations Board to have violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, by executing and maintaining a collective bargaining contract, containing a union security clause, with the respondent Englander company. It is the Board's theory that this conduct violates the Act because at the time such contract was executed, respondent union was being illegally "assisted" by respondent company (R. 88, petitioner's brief, pp. 24-27).

The record contains the following evidence relating to the conduct of respondent union.[2]

**The Facts**

Prior to January, 1956, respondent company operated two manufacturing plants on the west coast where it produces upholstered furniture and bedding, one at Los Angeles and the other at Oakland, in California (R. 317). The employees working in these plants were covered by collective bargaining contracts with local unions of the International Brotherhood of Teamsters (R. 125, 317). These agreements were similar (R. 125, 285, 303, 318) and they both contained the signature of Joseph Dillon, a representative of the Western Confer-

[2] Actually, the record contains only brief references to the activities of respondent union. At the hearing the attorney for the General Counsel directed the brunt of his case against the respondent company. He did not call a single officer or agent of respondent union to the stand, even as an adverse witness, and the union presented no witnesses of its own. Even the Board's brief filed in this action makes but brief mention of respondent union (pp. 24-27).

ence of Teamsters stationed in San Francisco (R. 126, 318).

In the latter part of 1955, John Sparrowk, a vice-president of respondent company in charge of its west coast operation, made a trip to Seattle, Washington, as a preliminary step in locating a third manufacturing plant for Englander in that city (R. 126-127). When Sparrowk returned to his Oakland headquarters, he was contacted by Dillon who inquired as to what he had been doing in Seattle. Sparrowk replied that he was attempting to locate facilities for a new plant (R. 126-127, 294-295). Dillon commented that, inasmuch as the Teamsters had contracts at the other Englander plants, they would also expect to have Englander's Seattle operation under contract (R. 126-127).

Englander's intention to acquire a Seattle plant materialized and in January, 1956, Sparrowk returned to Seattle where he made final arrangements to lease the plant and purchase some of the inventory and equipment of Craftmaster, Inc., a firm engaged in the same business as Englander (R. 116-117, 287, 288, 319-320). Some of the Craftmaster employees were members of Local 5 of the Upholsterers International Union of North America, A.F.L.-C.I.O.[3] Some were members of Local 3197 of the United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O.[4] and a few truck drivers were members of an unidentified Teamsters Local (R. 117-118, 156, 323). These unions had had col-

---

[3] Hereafter referred to as the Upholsterers.

[4] This union is referred to in the record as Furniture Workers, Local 3197, and is hereafter referred to as Furniture Workers.

lective bargaining agreements with Craftmaster (R. 117-118, 151-152, 155-156, 323), but these agreements were not assumed by Englander (R. 117-118, 289).

On January 9, 1956, while Sparrowk was in Seattle making final arrangements for the acquisition of Craftmaster facilities, Dillon introduced him to Bill Williams, the secretary-treasurer of respondent union. Dillon repeated his earlier comment about the desire of the Teamsters to obtain representation rights and get a contract covering Englander's Seattle operation (R. 292, 312).[5] Sparrowk told both Dillon and Williams that the company would do business with whichever union "could show us that they had the majority of the people represented by their union" (R. 128) and he made no commitment concerning recognition of respondent union (R. 292).

Subsequently, respondent union undertook an organizing campaign among the former Craftmaster employees, who were expecting to be re-employed by respondent Englander. The union invited groups of these employees to visit the Teamsters hall where agents of the union explained to them the Teamsters' health and welfare plan and the pension plan which the union hoped to get from Englander (R. 342). Reference was also made to the fact that the Teamsters had secured contracts from Englander in other states (R. 360).

The respondent union's organizing campaign, however, immediately clashed with claims by the Uphol-

[5] Although respondent company had not operated a manufacturing plant in Seattle prior to January, 1956, it had warehoused some of its products in that city (R. 287). This warehousing operation was handled by members of the respondent union (R. 292).

sterers and the Furniture Workers that the "jurisdiction" of the Seattle plant belonged to them.[6] Accordingly, representatives of these other unions met with Bill Williams, of respondent union, in an effort to resolve the jurisdictional claims (R. 89-190, 279-280).[7] The discussion at this meeting pertained largely to a pending effort by the Teamsters International Union and the Upholsterers International Union to resolve the jurisdictional issue under the terms of a mutual assistance pact to which those unions are parties (R. 190).[8]

On February 6, 1956, representatives of the Furniture Workers met again with Williams. Williams told them that the Teamsters International and the Upholsterers International had reached an agreement under the terms of which the Upholsterers formerly employed in the Craftmaster plant would retain their membership rights in Local 5; however, they would join respondent union and pay dues in order to be eligible for coverage under the Teamsters health and welfare plan. Williams then explored the possibility of reaching agreement with the Furniture Workers on the juris-

---

[6] Both the Upholsterers and Furniture Workers informed Sparrowk that they had "jurisdiction" in the plant and they demanded recognition by the company (R. 152-154, 170-171). When this demand was refused, both unions placed picket lines around the plant, even before it was officially acquired by Englander (R. 172-173, 183, 199, 378).

[7] The date of this meeting was not specified. It was some time before February 6, 1956 (R. 279).

[8] Although the record does not reveal it, the Teamsters and the Upholsterers have been parties to a mutual assistance pact dealing with organizing and jurisdictional matters since February 17, 1954. The text of this document can be found at 35 LRRM 85.

dictional question, offering a proposal by which the Furniture Workers could retain jurisdiction in the mill room, giving jurisdiction over other jobs to the Teamsters. One of the representatives of the Furniture Workers (Truman) was doubtful as to whether the Upholsters and the Teamsters had actually reached an agreement and he told Williams that until there was evidence that the other two unions had actually settled their differences, there was little to talk about (R. 160-161, 277).

On February 10, 1955, one Jeanette Testerman, a former Craftmaster employee and member of the Furniture Workers, received a call from a man she identified as Mr. Bombardier, an assistant business agent of respondent union, although she had never heard his voice before. Testerman testified that:

> ". . . he asked me if I wanted to go to work on the following Monday. I asked him if the labor dispute was straightened out and he said that they had a contract here and that as far as the picket line that we had on there, it wasn't a legal picket line." (R. 227)

A few days later, on February 13, 1956, after Sparrowk announced that the plant would open for production, the Upholsterers called a special meeting of their members. Royer, the local business agent, invited Bill Williams of respondent union to address the meeting (R. 201). Royer first spoke to the members informing them that he had received a wire from the Upholsters International Union stating that the members who formerly worked for Craftmaster were to work

under the Teamsters' jurisdiction (R. 202).[9] Williams then spoke to the group telling about the Teamsters insurance programs and pension plan and explaining that the Englander plants in California had Teamster contracts (R. 204). Williams and other Teamster officials then left the meeting and the Upholsterers voted unanimously in favor of a proposal to join the Teamsters Union and work under the Teamsters agreement (R. 205, 351-353). One of the members then suggested that they adjourn the meeting and go to the Teamsters Hall to get further information (R. 353).

Thus, on the afternoon of February 13, the Upholsterers' members went to the Teamsters Hall in Seattle where they were again addressed by officials of respondent union. Williams read to them from a contract that the Teamsters had obtained at other Englander plants and answered questions from the members, especially regarding the Teamsters pension plan and other benefits that they hoped to get from Englander (R. 205-206, 354, 356). Books and pamphlets were handed out stating how the benefits under Teamster contracts were better than those negotiated by the Upholsterers (R. 354). Applications for membership in respondent union were then circulated (R. 354-355).

On the same afternoon, February 13th, Jeanette Testerman went to the Teamsters Hall and talked to

---

[9] Apparently the agreement made by the International unions was that the Upholsterers would relinquish jurisdiction over the former Craftmaster employees, in exchange for which, the Teamsters would relinquish jurisdiction over several hundred employees in the Los Angeles area (R. 354).

Bombardier and Williams of respondent union (R. 230). These men explained that the Teamsters had contracts with Englander in other states and they discussed the merits of the health and welfare program and the pension program and other fringe benefits that they hoped to get in a contract with the company (R. 230, 240). Testerman then signed an application for membership in respondent union and a document which stated, in part, that the signer accepts "all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company" (GC Ex. 9, R. 233, 366). Testerman signed these documents voluntarily (R. 239- 240).

On the following day, February 14, 1956, the Furniture Workers Local held a meeting. During the course of this meeting Truman instructed the members to go to the Teamsters Hall and join the respondent union (R. 167-168, 173, 175). Truman did this on his own. He had no communication with respondent union concerning such an instruction (R. 173-174). Several members went immediately to the Teamsters Hall and joined respondent union (R. 247-248). These members were under the impression that the Furniture Workers Union was requesting that they join respondent union (R. 249, 252, 254, 265, 269-270).

Some time prior to February 6, 1956, respondent union submitted a proposed contract to Englander Company officials at Chicago, Illinois (R. 142, 303, 319). This contract, to which Dillon and Williams had affixed their signatures, was a duplicate copy of the contract in effect at the Los Angeles plant, except for

the designation of the parties (R. 308). It did not, however, contain any wage rates (R. 285). On or about February 6th, a company official in Chicago (Pink) called Sparrowk and told him that the Teamsters had submitted a proposed contract similar to the Los Angeles contract. Pink told Sparrowk that he was going to send the contract on to him, but giving him careful instructions that he was not to sign the contract, or any other contract, until he was convinced that the union involved represented a majority of the employees at the Seattle plant (R. 142, 303-304).

Late in the afternoon on February 13, 1956, Williams called Sparrowk, telling him that a majority of the employees in the potential labor pool in which Englander was interested had signed application blanks in the respondent union (R. 310). Sparrowk said he would like to have proof of that fact and he then went to Williams' office where Williams presented him with a pile of application blanks. Sparrowk examined and counted the application blanks and found that they numbered more than 60 (R. 314). He was convinced at that time that respondent union represented a proper majority of the production and maintenance employees who were working at the plant, or who had been engaged to report for work at the plant (R. 314-15).[10]

Williams called Sparrowk on the following day, February 14, and said he had an additional twenty or more applications (R. 313, 325). On the next day, February 15, 1956, just prior to Sparrowk's departure for

[10] On February 14 and 15, 1956, the Company began full production. As of February 15th, the company employed 94 regular production and maintenance employees (GC Ex. 13, R. 372-379).

Oakland, Williams came to the plant where he presented Sparrowk with the document known as general counsel's exhibit 9, which contained some 90 signatures (R. 366-367). Williams told him that this document represented the signatures that the union had of people who had made application to that date. Sparrowk then returned to Oakland where he signed the contract submitted by respondent union and returned it to Chicago (R. 141, 308, 311). The contract was effectuated on February 15th, the day on which the company began making payments of pension premiums (R. 311). The respondents had not agreed, however, on wage rates to be included in the contract. At the time of the hearing in this case, they had yet to complete negotiations on that issue (R. 285).

The contract contains a union security clause (GC Ex. 2, R. 360-361). There is no evidence that such clause has ever been enforced.

## ARGUMENT

### I. The Board Order Against the Respondent Union Is Null and Void and the Board's Petition for Enforcement of This Order Should Be Denied

The Board has found that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by executing and maintaining a collective bargaining contract, containing a union security clause, with respondent company at a time when it (the union) was receiving "illegal assistance" from the company (R. 88; petitioner's brief, pp. 24-27). Among other matters, the Board's order requires the union to surrender its con-

tract with the company until it has been appropriately certified by the Board (R. 94).

To establish that the union received illegal assistance the Board relies on a finding that the company and the union executed the collective bargaining contract at a time when the number of employees at work was not representative of the company's anticipated work force.[11] This is a choice example of circuitous reasoning —to prove there was an illegal contract the Board points to the assistance—to prove there was illegal assistance the Board points to the contract.

There are two questions which must be resolved with respect to whether the Board's order regarding respondent union is valid and enforceable (1) Is the Board's finding that the respondents executed a collective bargaining contract before a representative number of employees were at work supported by substantial evidence on the record as a whole? and (2) Is the Board's finding (or, more properly, its conclusion) that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) based upon proper findings of fact and is it correct as a matter of law?

For the reasons and arguments set forth hereafter we contend these questions should be answered in the negative and that enforcement of the Board's order should be denied.

---

[11] The Board also found other acts of "illegal assistance," in addition to the execution of the contract (R. 87-88), but there is no evidence that these acts, if they existed, were either solicited by respondent union or that the union subsequently acknowledged or ratified them. The only "assistance" in which the union knowingly acquiesced, if any, was in the execution of the contract.

### A. The Board's Finding that Respondents Were Parties to a Collective Bargaining Contract at a Time When the Number of Employees at Work Was Not Representative of the Company's Anticipated Work Force Is Not Supported by Substantial Evidence on the Record Before the Board Considered as a Whole

The evidence is undisputed that the respondents formally executed a collective bargaining contract on February 15, 1956, when John Sparrowk, West Coast vice-president of the company, affixed his signature to a contract proposed by the respondent union, after receiving evidence that the union represented a majority of the employees at the Seattle plant (R. 141-142, 303-304, 310-311, 313-315, 319). The Board did not find that the union did not represent a majority of the employees on February 15th, or that the number of employees at work on that date was not representative of the company's normal work force.

The Board did find, however, that the respondents, while not formally executing their contract until February 15th, had actually put the contract into effect before that date (R. 88). The Board is not certain exactly when the contract was first put in force, except that it was "prior to February 14th" (R. 88). The trial examiner took the view that the contract was in effect as early as February 10th (R. 57-58).

To support its finding that a contract was in effect prior to February 14th, the Board points to the following pieces of "evidence":

> "(a) In the autumn of 1955 and again on January 9, 1956, Dillon, a representative of the Western Conference of Teamsters, told the respondent

employer's Vice-President Sparrowk that the Teamsters expected to have the Seattle operation under contract, the same as elsewhere in the country.

"(b) At a plant meeting on February 13, 1956, that included representatives of the charging union, the respondent employer and the respondent union, Evans, a representative of the Furniture Workers remarked that Teamsters' representative Williams was apparently acting as the respondent employer's 'personnel manager.' Factory Manager Hunt replied that Williams had the right to ask job applicants to come to the plant inasmuch as the Teamsters held an agreement with the respondent employer.

"(c) Vice-president Sparrowk testified that, on February 6, 1956, Vice-President Pink telephoned him from the employer's Chicago, Illinois, headquarters to say that a contract signed by representatives of the respondent union was in the office.

"(d) On January 26, 1956, Sparrowk told Truman, a representative of the Brotherhood of Carpenters, that the respondent employer had a 'master agreement' of nation-wide scope with the Teamsters International, that he did not want to jeopardize good working relations with the Teamsters by signing a contract for the Seattle plant with another union, and that he feared reprisals if he did so. Also, on February 3, Sparrowk refused Truman's request for a consent representation election to be conducted by the Board because of a 'master agreement' with the Teamsters.

"(e) On February 10, 1956, Bombadier, a representative of the respondent union, telephoned applicant Testerman to ask her if she wished to go

to work. Bombadier told Testerman that 'they had a contract at the plant.'

"(f) As early as February 13, 1956, applicants for employment appeared at the respondent union's office and were asked to sign a document which recited that the signatory agreed to accept 'all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company * * *.'

"(g) The absence of any evidence of contract negotiations between the Respondent Employer and the respondent union together with the fact that the contract in evidence is little more than a duplicate of the one covering the respondent employer's Los Angeles plant, even to the extent of bearing execution date, October 1, 1955, and effective date, December 1, 1955—dates prior to the acquisition of the Seattle factory." (R. 89-90)

A careful analysis of this "evidence" show that it does not support the inference which the Board draws, and it is not "substantial evidence considered on the record as a whole."

**1. Items of "evidence" enumerated (a), (c) and (g) considered in the context in which they appear in the record do not support the inference that a contract was in effect prior to February 14th**

Assuming that items of evidence (a), (c) and (g) constitute "substantial" evidence,[12] a fair reading of this evidence, in the context in which it appears in the

[12] It is unlikely that this evidence rises to the dignity of "substantial" evidence. For example, items (a) and (c) are hearsay. Indeed, item (c) was specifically characterized by the trial examiner as being "hearsay evidence" (R. 60). See discussion of hearsay evidence, *supra*, at p. 17.

record, does not support the inference that a contract existed before February 14th.

The fact that Dillon told Sparrowk that the Teamsters "expected" to get a contract at the Seattle plant (item (a)) does not reasonably infer that the respondent union actually obtained such a contract before February 14th. Indeed, in the very conversation when Dillon told Sparrowk of this expectation, Sparrowk informed Dillon (and Williams) that the company would do business with whichever union could obtain majority representation (R. 128). The desire of the respondent union to win recognition was no different than that of the other unions involved. Both the Furniture Workers and the Upholsterers informed Sparrowk that they expected to be recognized at the Seattle plant and obtain a contract (R. 152-154, 170-171). In fact these unions openly and forcefully demonstrated their "expectation" of being recognized by placing picket lines around the plant, even before it was officially acquired by the respondent company (R. 172-173, 183, 199, 378).

Similarly, the fact that the respondent union submitted a proposed contract to the respondent company on or before February 6th, 1956 (item (c)) is not probative on the issue of when the contract was made effective. At the same time that Vice-President Pink told Sparrowk that a contract had been submitted by the union, he also told him that he was not to affix his signature to that contract, or any other contract, until he was convinced that the union involved represented a majority (R. 142, 303-304). Sparrowk followed these instructions, and did not sign the contract until Febru-

ary 15th, after he became convinced that the respondent union represented a majority of the employees at the Seattle plant (R. 311, 314-315).

Lastly the Board notes that the contract submitted by respondent union and signed by Sparrowk on February 15th, is a duplicate of the one covering the company's Los Angeles plant, and that there is no evidence that this contract was specifically negotiated (item (g)). It is beyond comprehension how the type of contract signed, or the quantity of negotiations leading up to that contract, is persuasive on the issue of *when* the contract was made effective. The fact that the parties may have agreed on a contract without any "table-thumping" negotiations is readily explained by the prior relationship between the Teamsters and Englander involving the company's California plants. Except for wage rates, the Teamster contracts at the California plants were similar (R. 125, 285, 303, 318). This "pattern-form" of contract was apparently desired by the respondent union and approved by the respondent company, on condition the union obtained majority representation.[13] In view of the Teamster contracts at the California plants, there was no reason to expect the parties to negotiate at length over the Seattle contract. The only issue upon which one might expect some negotiation would be wages, and it is to be noted,

[13] What the union did, apparently, was obtain a mimeographed copy of the California "pattern-form" contract, insert the name of the respondent union, and submit it to the company. Sparrowk testified that except for handwritten insertions, the contract was identical to the California contracts (R. 284-285, 308). This explains why the contract contains an execution date of October 1, 1955, a date several months prior to Englander's acquisition of the Seattle plant.

in this regard, that the respondents did not agree on wage rates for the Seattle plant. At the time of the hearing in this case, they had yet to complete negotiations on the wage issue (R. 285).

In summary, we submit that the expectation of the respondent union to win recognition at the Seattle plant, the union's submission of a proposed contract, identical to the California "pattern-form" contract, and the signing of that contract by the company without lengthy negotiations, *do not* support an inference that the contract was placed in effect before February 14th.

**2. Items of "evidence" enumerated (b), (d), (e) and (f) constitute hearsay evidence**

The items of "evidence" enumerated by the Board as (b), (d), (e) and (f) (R. 89-90). and said by the Board to support its inference that the respondents executed a collective bargaining contract before February 14th, 1956, are all items of hearsay evidence.

Each item is testimony or written evidence, presented in court, of a statement made out of court, such statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. See *McCormick on Evidence,* 1954 Ed., Sec. 225.

The statement made by Factory Manager Hunt to Evans (item b); the statements made by Sparrowk to Truman (item d); the telephone statement made by Bombardier to Testerman (item e); and the document with the notation on it (item f) are all used to prove

the truth of the matters asserted therein (*i.e.,* that a contract or agreement between the respondents was in effect). But, with the exception of Sparrowk, the declarants were not called as witnesses and made available for cross-examination. Hunt did not testify, Bombardier did not testify, and the individual who put the notation on the document circulated at the Teamsters Hall did not testify.

It is the statutory requirement that a finding in an unfair labor practice case be based upon "substantial" evidence. Sec. 10(e). See also *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 95 L.ed. 456 (1951).

Hearsay evidence is not "substantial" evidence. *Consolidated Edison Company v. N.L.R.B.,* 305 U.S. 197, 83 L.ed. 126 (1938). Thus, the Board (at least prior to this case) and the courts do not allow findings to be based solely upon hearsay evidence. *Ohio Associated Telephone Co.,* 91 NLRB 932 (1955); *N.L.R.B. v. Bell Oil & Gas Co.,* 98 F.2d 406 (5th Cir. 1938); *N.L.R.B. v. Ford Motor Co.,* 114 F.2d 905 (6th Cir. 1940), cert. denied, 312 U.S. 689, 85 L.ed. 1126; *A. E. Staley Mfg. Co. v. N.L.R.B.,* 117 F.2d 868 (7th Cir. 1941), *Oughton v. N.L.R.B.,* 118 F.2d 486 (3rd Cir. 1941); *N.L.R.B. v. Washington Dehydrated Food Co.,* 118 F.2d 980 (9th Cir. 1941); *N.L.R.B. v. Amalgamated Meat Cutters,* 202 F.2d 671 (9th Cir. 1953); *N.L.R.B. v. Haddoch Engineers,* 215 F.2d 734 (9th Cir. 1954).

Lest it be argued that these items of evidence would qualify as an exception to the hearsay rule under the theory that they constitute "admissions against interest" it should be pointed out that the record is barren of

any foundation evidence which would properly qualify them as admissions. First, there would have to be evidence that the declarants were duly authorized agents of the union or the company having the authority to make statements on behalf of their principals, and that they made the statements within the scope of their authority. This is a generally accepted rule. See 20 Am. Jur., Evidence, Sec. 589. And it is a rule of evidence in force in the State of Washington. *Tacoma and Eastern Lumber Company v. A. B. Field and Company,* 110 Wash. 79, 170 Pac. 360; *State ex rel. Hamilton v. Standard Oil Company,* 190 Wash. 496, 68 P.2d 1031.

Secondly, admissions must be expressed in definite, certain and unequivocal language. See 20 Am. Jur., Evidence, Sec. 546, and the Washington cases *Dollar v. Northwestern Improvement Company,* 72 Wash. 1, 129 Pac. 578; and *Ludberg v. Barghoorn,* 73 Wash. 476, 131 Pac. 1165. The items of evidence relied upon by the Board could not meet this test.

The statement of Hunt that the "Teamsters held an agreement with the Englander Company," and Sparrowk's asserted reference to a "master agreement" are far from clear, certain and unequivocal assertions that Englander and respondent union Local 117 were parties to a contract covering the Seattle plant. Sparrowk's asserted reference to a "master agreement" is especially dubious because no such agreement was ever produced and Sparrowk denied that one existed (R. 295).[14]

[14] In any event, if these asserted statements were properly characterized as "admissions," they might be binding upon the company but they are not binding on respondent union.

For similar reasons, the document circulated at the Teamster's hall, and Bombardier's telephone conversation with Testerman, fail to constitute "admissions" by the respondent union that it was a party to a collective bargaining contract before February 14th.

**The Document Signed at the Teamsters' Hall**

The document which some new members of respondent union signed while at the Teamsters' hall contained, in part, the following notation:

> "We . . . accept as a new employee of the Englander Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company. . . . " (G.C. Exhibit 9, R. 366)

This language was certainly not clear and unequivocal in the eyes of the trial examiner. He spent several paragraphs explaining why he felt that the reference to the "International Brotherhood of Teamsters" meant respondent union Local 117 (R. 55-58).

Viewed in the light of other evidence in the record, this document appears to be simply an indication that the new members of respondent union were willing to have for a collective bargaining contract at the Seattle plant the same "pattern-form" of contract in effect at Englander's California plants.

As we have previously noted, respondent company has contracts with the Teamsters at its Oakland and Los Angeles plants which are basically the same, except for wage items (R. 125, 285, 300, 318). During respondent union's organizing campaign repeated ref-

erences were made to this California "contract." In January, for example, Bombardier (assistant business agent of the union) told one prospective member, who wanted to know what the Teamsters had to offer, that the Teamsters had contracts with Englander in other states. The witness was asked if Bombardier mentioned anything about a contract covering the Seattle plant, and he answered, "no" (R. 360).

Again, one of the general counsel's witnesses (Royer) testified that at a meeting of the Upholsterers' local, Williams (Secretary-Treasurer of respondent union) explained that the Teamsters had contracts with Englander in California (R. 204) and that at a subsequent meeting Williams read the terms of a contract "they have up and down the coast" (R. 205). This was not a signed contract, but was sort of a form contract (R. 205-206).

Another of the general counsel's witnesses (Testerman) testified that she went to the Teamsters' hall on February 13 and that the union officials there explained that the Teamsters had contracts with the company in other states (R. 240) and a contract was exhibited to her and the other people with her (R. 234). The union officials also explained the health and welfare plan and the other benefits they hoped to get in Seattle, apparently referring to the health and welfare clause in the California contract (R. 230).

Still other witnesses (Walters and Dantini) testified that the officials of Local 117 explained, in a meeting which they attended, the health and welfare plan and

the pension plan they hoped to get from Englander (R. 342, 354, 356).

The foregoing evidence reveals that officials of respondent union, as part of their organizing work, were continually making reference to a contract which the Teamsters had in California with the company and which they hoped to get in Seattle. This contract was unsigned and was more or less a pattern form of contract. Even the attorney for the general counsel, in referring to an unsigned copy of the California contract he offered in evidence as G.C. Exhibit 5, referred to it as a "pattern form of contract" (R. 140).

In summary, when certain members of respondent union attached their signatures to the sheet of paper in question, they were stating their willingness to accept the terms of the *pattern form of contract* which the Teamsters had obtained in California, which had been exhibited to them in the organizing campaign, and which respondent union hoped to sign with Englander for the Seattle plant. This is a more probable explanation of what the notation means, and it is an explanation consistent with other evidence in the record.

**The Phone Call**

Likewise, when Testerman talked to Bombardier on February 10 and when, in her words—

> "I asked him if the labor dispute was straightened out and he said that they had a contract here and that as far as the picket line that we had there, it wasn't a legal picket line." (R. 289)

—Bombardier was, in all likelihood *either* referring to

the *pattern form of contract* which was a part of the organizing effort of respondent union (and which Bombardier himself exhibited to Testerman just three days later (R. 234)) or else he was referring to a contract or agreement which the Teamsters had reached with the Upholsterers' union in an effort to end the jurisdictional struggle between the unions. This meaning is more probable in view of the fact that Bombardier was replying to Testerman's inquiry as to whether the "labor dispute was straightened out." This is consistent with other testimony to the effect that four days earlier, on February 6, officials of Local 117 were under the impression they had reached an agreement with the Upholsterers on the matter of jurisdiction (R. 161).

In any event, Bombardier's exact words were not quoted, and from what is given, a number of different meanings are possible, the most reasonable of which, as we have noted, are contrary to the interpretation made by the Board.

In summary, we have pointed out how items of evidence (b), (d), (e) and (f) are hearsay evidence, failing to meet the statutory test of "substantial evidence." It cannot be contended that these items of evidence constitute exceptions to the hearsay rule on the ground they are "admissions against interest" for, among other reasons, they lack the clarity, definiteness and unequivocal character necessary for a proper admission against interest.

Furthermore, we have shown how this evidence is capable of giving rise to different inferences, inconsistent with the inference drawn by the Board. This is a

further reason why the evidence is not "substantial evidence":

> "Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely amounts to a suspicion or which amounts to a scintilla or which gives equal support to inconsistent inferences." *N.L.R.B. v. Shen Valley Meat Packers, Inc.,* 211 F.2d 289 (4th Cir. 1954).
>
> "A trace or a wisp of evidence, a single, vague and inconclusive reply by a single witness that could reasonably be construed in various ways, either in support of, or contrary to, the Board's contention is not substantial evidence. . . . " *N.L.R.B. v. McGraw & Co.,* 206 F.2d 635 (6th Cir. 1953).

### 3. The Board's inference that a contract existed prior to February 14th is unreasonable in light of the entire record

Assuming (for sake of argument) that the Board has properly inferred, from proper items of substantial evidence, that the respondents were parties to a contract before February 14th, that inference should be rejected as *unreasonable in the light of the entire record.* The Board can properly draw inferences from "substantial" evidence, but the inferences drawn must be reasonable. *Sax v. N.L.R.B.,* 171 F.2d 769 (7th Cir. 1948); *N.L.R.B. v. Sunset Minerals,* 211 F.2d 224 (9th Cir. 1954). See also *Universal Camera v. N.L.R.B.,* 340 U.S. 474, 95 L.ed. 456 (1951).

Considering the entire record, the presence of evi-

dence therein, and the lack of evidence therein, we submit the following reasons why the inference drawn by the Board is not reasonable:

(1) There *is no evidence* in the record that any employee or prospective employee of the company's Seattle plant ever saw a contract which purported to cover the wages and working conditions at that plant before February 15. To the contrary, one of the leading witnesses for the General Counsel was asked if she ever had seen such a contract and she answered in the negative (R. 236).

(2) There *is no evidence* that either the company or the union put into effect any provisions of this contract before February 15. There *is no evidence* that before that date wages, hours or working conditions at the Seattle plant were governed by this contract. The only evidence of when the contract was implemented is Sparrowk's undisputed testimony that the company began making pension payments as of February 15 after he affixed his signature to the contract (R. 311). Most important, there *is no evidence* that the union security clause of this contract was implemented in any way before February 15. In fact, there is no evidence in the entire record that it was ever implemented.

(3) There *is substantial evidence* that respondent company was unaware of any contract being in effect before February 15. Sparrowk testified, without contradiction, that when he went to Seattle to locate a new plant he had no instructions from his superiors with respect to recognition of the Teamsters' union and the Teamsters did not present him with any agreement (R.

299). When Sparrowk met with Dillon and Williams on January 9th and heard them express their desire to win recognition at the Seattle plant, he informed them that the company would do business with whichever union represented a majority of the people in the plant (R. 128). He made no commitment regarding recognition of respondent union (R. 292). The only contract he knows of concerning the Seattle plant is the respondent union's proposed contract which was sent to him from Chicago and to which he attached his signature on February 15th, after becoming convinced that the respondent union represented a majority (R. 283, 303-304).

(4) There *is substantial evidence* that respondent union was unaware of any contract being in effect before February 15. The record contains undisputed testimony to the effect that the union was busy signing up members from among the prospective employees of Englander as late as February 13 and 14. One of the general counsel's main witnesses testified that when she went to the Teamsters' hall on the 13th the union officials there, in an attempt to solicit membership, explained the merits of the health and welfare and pension plans and other features of the contract *they hoped to have* with Englander (R. 230, 240). Another witness testified that, on that date, the officials of Local 117 handed out literature and pamphlets and explained what a good program they had to offer (R. 354). This raises an important and crucial question. If respondent union had a contract with Englander as early as February 10, as the Board claims, a contract which con-

tained an exclusive recognition clause and a union security clause, *why was the union still attempting to organize prospective employees up until the time the contract was formally signed? Why did the union bother to obtain a majority, if through premature execution of a contract, they did not need a majority?* The answer is obvious—no contract was in effect until February 15.[15]

For the foregoing reasons, the Board's inference that the respondents were parties to a collective bargaining contract before February 14th should be set aside as unreasonable.

**B. The Conclusions of Law Entered by the Board with Respect to Respondent Union Are Based Upon Unsupported Findings of Fact, and, in Addition, Are Incorrect as a Matter of Law**

The Board's legal theory, in this case, is that respondent union has violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by executing and maintaining a collective bargaining contract, containing a union security clause, at a time when it was receiving "illegal assistance" from respondent company (R. 88; Petitioner's brief, pp. 24-27). This conclusion is founded upon the Board's finding that respondent company "assisted"

[15] It is also significant that the representatives of the Furniture Workers and the Upholsterers, who met on two occasions prior to February 15th with Williams, the secretary-treasurer of the respondent union, never heard Williams claim that the union had a contract at the plant. Williams' comments at these meetings related solely to an attempt by the three unions to resolve their competing jurisdictional claims. The only "agreement" Williams mentioned was a pending agreement between the Upholsterers International and the Teamsters International on the jurisdictional question (R. 160-161, 189,190, 277, 279-280). If, as the Board claims, respondent union already had a contract covering the company's Seattle plant, there would have been no reason or necessity for Williams to participate in such discussions.

respondent union by entering into a collective bargaining contract with it, at a time, prior to February 14th, when the number of employees at work was not representative of the respondent company's anticipated work force. But, as we have demonstrated in the foregoing portions of this brief, the Board's finding that the parties had executed such a contract prior to February 14th is not supported by substantial evidence on the record as a whole. Having no proper factual foundation to support it, the Board's legal conclusion must be rejected.

However, even apart from the lack of supporting evidence, there are additional reasons why the Board's legal conclusions are incorrect.

**1. The Board's conclusion that respondent union has violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case is incorrect as a matter of law**

Assuming, arguendo, that respondent union did enter into a collective bargaining contract, containing a union security clause, at a time when it was being "illegally assisted" by respondent company, and that this made the union security clause illegal, there is no legal justification for a conclusion that the union thereby violated Sections 8(b)(1)(A) and 8(b)(2). *There is no substantial evidence in the entire record, or a finding by the trial examiner or the Board, that any of the employees knew that the contract, if it existed, contained a union security clause.*

Section 8(b)(2) states, in part, that it is an unfair labor practice for a union to:

"to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . "

Section 8(a)(3) states, in part, that it is an unfair labor practice for an employer:

"by discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization:* Provided, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining union covered by such agreement when made. . . . " (Emphasis added)

The thrust of an 8(b)(1)(A) and 8(b)(2) charge, as made in this case, is that a union violates those sections of the Act, by merely entering into an illegal union security clause with an employer. The rationale behind this rule is that employees will be "encouraged," in contravention of Section 8(a)(3) of the Act, to acquire or maintain union membership by the very presence of the clause in the contract. As the Second Circuit has stated:

"The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice. This is so because the existence of

> such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge *if he defies the contract* by refusing to become a member of the union." (Emphasis added) *Red Star Express v. N.L.R.B.,* 196 F.2d 78 (2nd Cir. 1952).

The necessary assumption for this rationale is that the employees *know* the clause is in the contract, either by reading it or being told of it. Where no employee knows of the existence of the illegal union security clause, it is a reasonable conclusion that employees are not being subjected to "encouragement" thereby. *It is logically and practicably impossible for an illegal union security clause to have an effect upon employees who are completely unaware of its existence.* Compare *N.L.R.B. v. Eichleay Corporation,* 230 F.2d 64 (6th Cir. 1956).

Also, there is no evidence in the record, or finding by the trial examiner or the Board, that the union security clause was ever implemented or that the union (or the company) ever intended to implement it. In such a case, the mere presence of the clause in the contract is not a violation of 8(b)(2). *Port Chester Electrical Const. Co.,* 97 NLRB 354 (1951); *Jandel Furs,* 100 NLRB 1390 (1952).

For these reasons, there is no justification for the conclusion of the trial examiner that respondent union violated Section 8(b)(1)(A) and 8(b)(2) by its conduct in this case.

**2. The authorities cited by the Board do not support the Board's Conclusion that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case**

The weakness of the Board's legal theory involving the liability of respondent union is underscored by the fact that neither the trial examiner nor the Board have cited a single case which can be fairly said to support the Board's position that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case. None of the cases cited by the trial examiner at footnote 20 of the Intermediate Report (R. 54) and none of the cases cited by the Board in its brief (pp. 24-27) is a case where a union has been held to have violated Sections 8(b)(1)(A) and 8(b)(2) by executing and maintaining a contract, containing a union security clause, at a time when it (the union) was receiving "illegal assistance" from an employer. Insofar as the authorities cited involve 8(b)(1)(A) and 8(b)(2) violations by unions, they are based on factual situations where the union has executed a "closed shop" agreement, or other type of union security clause obviously forbidden by the statute. None involve a claim that the union was "illegally assisted," or a fact situation similar to that in the instant case.

## C. CONCLUSION

For the foregoing reasons, respondent union contends that the Board's order, insofar as it affects respondent union, is null and void, and respondent union

respectfully requests that this court enter a decree denying enforcement of the order.

Respectfully submitted,

BASSETT, DAVIES & ROBERTS
811 New World Life Building
Seattle 4, Washington
*Attorneys for Respondent Union.*

*Of Counsel:*
RICHARD P. DONALDSON